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IN THE
Supreme Court of the United States

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL VOTING RIGHTS INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus National Voting Rights Institute is a non-profit organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to an equal and meaningful vote and to equal and meaningful participation in every phase of electoral politics.[1] Through litigation and public education, the Institute works to ensure that those who do not have access to wealth are able to participate fully in the political process.

Wealth is far too important in modern elections—so much so that without meaningful regulation of campaign finance, including expenditures coordinated by parties and their candidates, the ability of those without wealth to participate meaningfully in the political process is threatened. Because of the compelling interests in the integrity of the political process that are at stake, the Institute respectfully urges reversal of the Tenth Circuit's ruling invalidating the limits on party-candidate coordinated expenditures found in the Federal Election Campaign Act ("FECA") at 2 U.S.C. § 441a(d)(3).

SUMMARY OF ARGUMENT

This Court has rightly upheld the constitutionality of limits on direct contributions to candidates. Those limits are necessary to contain the corrosive effect of wealth on the political process. As Congress and the FEC have well understood, party-candidate coordinated expenditures are functionally indistinguishable from direct contributions, and must be regulated. Without such regulation, the limits on direct contributions are easily circumvented.

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[1] Pursuant to Rule 37.3(a) the parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no other person or entity made a financial contribution to the preparation or submission of this brief.

The statutory limits on coordinated expenditures reflect Congress' unique understanding of the interests at stake in political finance, and balance rights of expression and association with the need to preserve the integrity of the political process. The balance Congress struck is entitled to deference. At the hands of the Tenth Circuit panel majority below, it received no such deference.

Finally, while the limits on coordinated expenditures are needed to fight corruption and the appearance of corruption, these are not the only threats to the integrity of the political system at issue here. Political integrity also depends on preserving the right of all citizens to participate equally in the political process, regardless of wealth. The government must have—and, consistent with this Court's precedent, does have—the ability to ensure that this principle of equal and meaningful participation in the political process is vindicated.

ARGUMENT

I. COORDINATED EXPENDITURES ARE *DE FACTO* DIRECT CONTRIBUTIONS THAT CONGRESS RECOGNIZED MUST BE LIMITED TO AVOID UNDERCUTTING EXISTING LIMITS ON DIRECT CONTRIBUTIONS

Political campaigns, by and large, are bankrolled by an elite group of wealthy donors. Nearly two-thirds of the "hard money"[2] raised during the first 18 months of the 2000 election cycle by federal campaigns and parties came from

[2] Hard money—money regulated under FECA and contributed for the specific purpose of electing certain candidates or defeating others—remains the lifeblood of political campaigns. For every dollar of "soft money" (i.e., unregulated money ostensibly contributed for party-building and voter registration) raised by parties in the 2000 federal elections, nearly five hard dollars were raised by parties and federal candidates. *See* Public Campaign, Press Release, HARD FACTS: HARD MONEY IN THE 2000 ELECTION (Oct. 31, 2000), *at* http://www.publicampaign.org/press_releases/ pr10_31_00.html.

special interest PACs and individuals who gave $200 or more.[3] Hard money contributors who gave more than $200 in the 1996 election comprised one-quarter of one percent of the population of the United States.[4]

These wealthy donors—who constitute a tiny fraction of the United States population—enjoy personal access to candidates that nearly all other voters do not.[5] This unseemly situation exists *despite* the existing regime of limits on contributions and party-candidate coordinated expenditures.[6]

Though far from perfect, to some degree the existing limits on campaign finance do cabin the role, and unfair preeminence, of wealth in American politics. As shown *infra*, these limits should not be eroded. Affirming the Tenth Circuit's decision to strike down the limits on coordinated expenditures would do so.

[3] *See* Public Campaign, Report, HARD FACTS: HARD MONEY IN THE 2000 ELECTION (Oct. 2000), *at* http://www.publicampaign.-org/hardmoney.html.

[4] *See id.* According to analysis by the Center for Responsive Politics of FEC figures, as of November 1, 2000, the number of persons who contributed $1,000 or more in hard money to parties stood at a mere 36,859, which is roughly *one-hundredth of a percent* of the United States' population. *See* Center for Responsive Politics, *Analysis of Hard Money Contributions to Political Parties for the 2000 Election Cycle* 1 (Nov. 28, 2000) (on file with the Center for Responsive Politics).

[5] A study conducted two years ago surveying individuals who contributed more than $200 to federal candidates revealed that the overwhelming majority of large contributors report personal communication with officeholders they support, often concerning their jobs and businesses. John Green *et al.*, Joyce Found. of Chicago, INDIVIDUAL CONGRESSIONAL CAMPAIGN CONTRIBUTORS: WEALTHY, CONSERVATIVE—AND REFORM MINDED (1998) (also finding that 95% of large contributors were white, and 81% were white males).

[6] Just over a thousand people gave the maximum amount of $20,000 in hard money allowed under federal law to political parties. *See* Center for Responsive Politics, *Analysis*, *supra* note 4, at 1.

A. Coordinated Expenditures Are Direct Contributions

Limitations on direct contributions to candidates have been upheld under constitutional scrutiny, *see Buckley v. Valeo*, 424 U.S. 1, 23-38 (1976), and FECA treats expenditures made by most persons in coordination with candidates as though they were direct contributions from the person. *See* 2 U.S.C. § 441a(a)(1)(A), (2)(A), and (7)(B)(i). The reason is straightforward: if a would-be contributor can instead simply pick up the tab for all of the candidate's expenses, then limits on the amount of direct contributions become meaningless. Under the FECA provision challenged here, § 441a(b)(3), political parties can make coordinated expenditures (i.e. contributions) that are much larger than those allowed by FECA for ordinary persons. Thus, FECA's structure already assures that political parties have a favored status with respect to political contributions.

Though FECA regulates so-called "hard money" contributions to parties that are "earmarked" for the election of certain candidates or the defeat of opponents, "soft money" donations for party-building and other activities are unregulated and unlimited. In this environment, unlimited coordinated expenditures create back-channels—illicit, perhaps, but difficult to police—for harnessing soft money in ways that accomplish hard money objectives while avoiding hard money restrictions. As Congress recognized, the ability of (and pressure upon) parties "to funnel large amounts into the campaigns of particular candidates in response to large donations by outside interests" threatened to turn unlimited coordinated expenditures into an easily-exploitable loophole for the evasion of contribution limits.[7] *FEC v. Colorado*

[7] Even putatively "independent" party expenditures may not be very independent. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 648 (1996) (Stevens, J., joined by Ginsburg, J., dissenting) (arguing that all money spent by parties on behalf of candidates, including independent expenditures, should be considered contributions to the candidate); Archibald Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns*, 31 CLEV. ST. L. REV. 395, 410 (1982) ("Wherever gratitude for the past or fear that the money may not be forthcoming in the future is enough to influence official action, little will turn upon whether the financial help takes the form of a contribution or a so-called independent expenditure . . . .").

Republican Fed. Election Comm., 213 F.3d 1221, 1240 (10th Cir. 2000) (Seymour, J., dissenting). Savvy contributors, with the benefit of unlimited coordinated expenditures and the right amount of winking and nodding, can cause donations to pass to the intended candidate. And, as Congress recognized, such problems are most effectively solved through prophylactic measures such as coordinated expenditure limits; regulations devised to directly interdict influence peddling (e.g., FECA provisions treating donations to parties "earmarked" for particular candidates as contributions) simply give rise to sophisticated but effective evasion. *See id.* at 1241 (Seymour, J., dissenting) (record reveals that "earmarking" prohibition "is circumvented through 'understandings' regarding what donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote."); *cf. Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 908 n.7 (2000) (bribery statutes inadequate to effectively address the problem of corruption).

B. Limits On Coordinated Expenditures Reflect Congress' Understanding Of The Intricacies Of Political Finance

Limits on campaign contributions and expenditures are often portrayed by their detractors as black-and-white examples of censorship of political speech. This analysis is grossly oversimplified; though political contributions may

implicate constitutionally protected rights of speech[8] and association, campaign finance limits also secure and maintain the integrity of the political process, a constitutionally-protected interest in its own right. *See Shrink Missouri*, 120 S. Ct. at 911 (Breyer, J., concurring).

Congress' keen understanding of the need to prevent wealth from having a predominant and undue role in political speech and political participation formed the basis for the appropriate prophylactic limits on coordinated expenditures at issue in this case. *See Colorado Republican*, 213 F.3d at 1243 (Seymour, C.J., dissenting). Neither *Buckley* nor subsequent cases counsel the sort of flamboyant second-guessing of legislative decisionmaking exhibited by the panel majority. Courts should defer to Congress' empirical determination that limits on *laissez faire* campaign finance will protect the overall health and integrity of the political process. *See Shrink Missouri*, 120 S. Ct. at 912-13 (Breyer, J., concurring); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 268-70 (1986) (Rehnquist C.J., dissenting); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting); *cf. Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 109-208 (1997); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 684-86 (1966) (Harlan, J., dissenting); *see also Colorado Republican*, 213 F.3d at 1237 (Seymour, C.J., dissenting) (majority's opinion "replete with instances in which Congressional assessments and priorities are criticized and disregarded").

Nevertheless, neither the District Court nor the panel majority paid proper consideration to the evidence supporting Congress' decision to restrict coordinated expenditures.

[8] This position is not without controversy; *see Shrink Missouri*, 120 S. Ct. at 910 (Stevens, J., concurring); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1004 (1982) (money "registers intensities" but in itself "communicates no ideas.").

Compare Colorado Republican, 213 F.3d at 1228, 1231 (majority opinion) (relying on academic works and jokes about sanitary engineers) *with id.* at 1240-42 (Seymour, C.J., dissenting) (citing affidavits, congressional testimony, media articles and interviews ignored by majority) *and Shrink Missouri*, 120 S. Ct. at 906 (affidavits, media accounts, and voting records clearly outweighed disputed academic texts).[9] Most egregious, perhaps, was the panel majority's effort to instruct Congress on the true nature and role of political parties in American politics, *see Colorado Republican*, 213 F.3d at 1231 (majority opinion); *id.* at 1243 (Seymour, C.J., dissenting) (*"As a matter of common sense, it is difficult to credit the bald assertion that politicians do not understand the role political parties play in American politics"*) (emphasis in original).[10]

II. THE PRINCIPLE OF POLITICAL EQUALITY PROVIDES A LEGITIMATE BASIS BEYOND THAT OF PREVENTING CORRUPTION FOR UPHOLDING LIMITS ON COORDINATED EXPENDITURES

Seizing on language in *FEC v. National Conservative PAC*, 470 U.S. 480 (1985), the Court of Appeals panel's majority opinion erroneously implies that corruption (real or

[9] In a November 1996 Pew Research Center survey of 1,204 Americans, 53% of them considered the "power of special interest groups in politics" to be a "threat to the nation's future." Only international terrorism garnered a higher percentage of responses (54%). Pew Research Center, *Politics, Morality, Entitlements Sap Confidence—The Optimism Gap Grows* (Jan. 17, 1997), *at* http://www.people-press.org/unionrpt.htm.

[10] The majority, in a footnote, contended that its lecture on the role of political parties was intended for the FEC, not Congress, *see Colorado Republican*, 213 F.3d at 1231 n.7; the explanation is hardly convincing given that § 441a(d)(3) is a *statute*, not an FEC rule. Even if convincing, it seems no more appropriate to lecture the FEC than Congress on this subject.

perceived) is the *only* "constitutionally sufficient justification" for limiting political donations or coordinated expenditures. *See Colorado Republican*, 213 F.3d at 1227. Without doubt, preventing corruption, or the appearance of corruption, from taking hold in the electoral process on its own is a sufficient justification for reversing the decision below. Nevertheless, any examination of contribution limits must also consider another treasured value of our democratic system -- equality.[11] Political equality is "the cornerstone of American democracy,"[12] and the overarching principle which constitutional liberties must serve. *See* John Rawls, POLITICAL LIBERALISM 356-63 (1993).

As the FEC persuasively argued below, the limits on coordinated expenditures at issue in this case were enacted to address a grave threat to the integrity of the electoral process that centers on the specter of corruption. However, limits on coordinated expenditures not only reduce the risk of corruption but also have a deeper resonance in democratic theory. As legislatures and this Court have recognized, corruption looms when vast wealth, amassed without popular support, threatens to dominate the political process. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990) (quoting *Massachusetts Citizens for Life*, 479 U.S. at 258). In other words, the root of corruption lies in political inequality, where undue advantages are accorded based on wealth. As Justice Breyer has written, restrictions on

[11] *National Conservative PAC* does not foreclose other justifications for limits on contributions and coordinated expenditures. In that case, the Court reaffirmed that preventing corruption was a legitimate and compelling interest, adding that it was the only "*compelling* interest *thus far identified*." *National Conservative PAC*, 470 U.S. at 496-97 (emphasis added).

[12] J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 625 (1982).

contributions "aim to democratize the influence that money itself may bring to bear on the electoral process." *Shrink Missouri*, 120 S. Ct. at 911 (Breyer, J., concurring); *see also Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 649 (1996) (Stevens, J., dissenting) ("Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns.").

Removing the restrictions on coordinated expenditures opens a loophole in the constitutionally acceptable framework of limiting direct contributions that would corrode the principle of equal participation—regardless of affluence—in the political process. *Amicus* submits that every citizen should be able to cast an effective vote, run for office, and add his or her voice to the national political discourse without having to be wealthy to do it.

More than thirty years ago, in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), this Court laid to rest the notion that a citizen's wealth (or lack thereof) ought to qualify (or prevent) her from exercising the franchise. The right of voters, regardless of wealth, to participate meaningfully in the electoral process is not isolated from the ability of candidates, regardless of wealth, to participate meaningfully as well. *See Bullock v. Carter*, 405 U.S. 134 (1972). In *Bullock*, the Court struck down filing fees for Texas's local elective office primaries that were prohibitively high—so high that candidates without sizable war chests were effectively precluded from running. The Court noted that it had not until then regarded restrictions that hindered candidates with the same level of scrutiny that it had applied to restrictions on the franchise, but concluded that stringent scrutiny was appropriate because the high cost of running in the primaries would limit voter choice. Particularly, the Court noted that high primary costs would prevent under-financed candidates, who might conceivably be favored by less-wealthy voters, from running. *See id.* at 142-44; *see also Lubin v. Panish*, 415 U.S 709, 717-18 (1974).

While few would discredit the importance of wealth-blind political equality to our system of government, the efforts of government to vindicate that goal have not gone unquestioned, particularly when those efforts take the form of limits on contributions and expenditures in political campaigns that have resulting effects on political speech. In particular, *Buckley* flatly states that the government cannot "restrict the speech of some . . . in order to enhance the relative voice of others." *Buckley*, 424 U.S. at 48-49. But, as Justice Breyer has stated, "those words cannot be taken literally." *Shrink Missouri*, 120 S.Ct. at 912 (Breyer, J., concurring); *see* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1383 (1994) (proposition "demonstrably false").[13] "It is one thing

[13] Among other things, the health and vitality of the political process depends upon the public having access to a wide range of political opinions and views. This proposition is central to democratic politics and the core of the First Amendment itself. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (public discussion and informed deliberation are both the prerequisite for and achievement of democratic government and the First Amendment). Ensuring public access to a multiplicity of information sources is a government interest of the "highest order." *Turner Broadcasting System*, 520 U.S. at 190. Indeed, the animating purpose behind the protections of the First Amendment has been to secure a *system*—not just a conglomeration of individual rights of expression and association—in which a diversity of opposing and contradictory views would be publicly available. *See Bellotti*, 435 U.S. at 783 (First Amendment protects against limitations on "the stock of information" available to the public); *id.* at 804-12 (White, J., dissenting) (locating First Amendment interest in preventing corporate domination of political speech); *Associated Press v. United States*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.) (First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.")).

Buckley should not be read to prohibit regulation aimed at preventing affluence, detached from broad popular support, from *dominating* the electoral process. *See Bellotti*, 435 U.S. at 809-11 (White, J., dissenting). Furthermore, reversing the panel majority's decision in this case would

to say that government cannot silence some in order to amplify the views of others in the open marketplace of ideas, and quite another to insist that, in the arguably zero-sum 'marketplace' of electoral influence, where amplifying the reach and impact of some voices necessarily reduces that of their opponents, government cannot reduce the clout of some in order to advance the goal of equalizing influences of election outcomes." Laurence Tribe, AMERICAN CONSTITUTIONAL LAW § 13-29 at 1141 n.2 (2d ed. 1988). Indeed, before and after *Buckley* and in contexts political and otherwise, this Court has upheld government measures that limit or dilute the intensity of one voice, or a few voices, to keep them from drowning out others. *See Shrink Missouri*, 120 S. Ct. at 912 (Breyer, J., concurring); *Turner Broadcasting Systems*, 520 U.S. at 192-93 (upholding Cable Act "must carry" provision and rejecting cable operators' argument that a "rump broadcasting industry" would satisfy the government interest in ensuring the "widest possible dissemination of information from diverse and antagonistic sources" (internal quotations omitted)); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-88 (1980) (state law allowing pamphleteers in private shopping mall did not infringe disagreeing mall owner's First Amendment rights); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389-90 (1969) (upholding FCC rebuttal requirement for broadcast personal attacks and political editorials). *See also* Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 10-11 (1948) (some regulation of political speech necessary for the orderly presentation and intelligent deliberation self-government requires). The absolutist position that political

not have a substantial effect on the amount or quality of political speech; even under the coordinated expenditure limits, parties (and their benefactors) remain free to make essentially unlimited independent expenditures. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996).

equality is a laudable goal that government can nonetheless never pursue, encouraged by some unfortunate and inaccurate language in *Buckley*, is simply wrong.

CONCLUSION

In short, unlimited coordinated expenditures would short-circuit contribution limits and allow the influence peddling that those limits suppress to flourish once again.[14] Removing such limits would only magnify the importance to political parties of the tiny, unrepresentative fraction of citizens able to donate the largest sums to parties. *See supra* at 2-3. Unlimited coordinated expenditures would thus be destructive to the principle that no one is entitled to "more" or "multiple" representation in our democracy. *See generally* Marlene Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 (1974). The coordinated expenditure limits at issue here are in keeping with this principle, ensuring that party assistance represents "'the involvement of many voters and not merely the influence of a wealthy few.'" *Colorado Republican*, 213 F.3d at 1238 (Seymour, C.J., dissenting) (quoting S. Rep. No. 93-689 (1974).

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[14] Indeed, even with existing limits on contributions and coordinated expenditures in place, monied interests, using "bundled" or coordinated donations and other strategems, still exert overmuch influence on the electoral process. *See* Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1140-42 (1994); Jamie Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 326-27 (1993); *see also* note 5, *supra*. Eliminating coordinated expenditure limits would simply make matters worse.

Respectfully submitted,

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